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Supreme Court of the United States

OCTOBER TERM, 1955.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

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TABLE OF CONTENTS.

		PAGE
I.	"Loss of Status" Question	1
	Misstatements of Petitioners' Contentions Corrected	1
	The Board's Findings Are Ambiguous and Self-Contradictory	3
	The "Loss of Status" Clause Deals With a Separate Facet of Renegotiation	5
	The "Inequities" Claimed by Respondent Are Not Sustainable	6
	Procedural Delay Is No Criterion of Jurisdiction	7
	The Legislative History Supports Petitioners' Construction	7
II.	The "Breach of Contract" Question	13
	Statistical Information Negatives Respondent's Construction	13
	Correction of Reference to Section 13; Applicability	15
	Even under Respondent's "Correlative" Construction Petitioner Prevails	16
	Confusion of the Existence of Rights With Their Arbitrability	16
	Reexamination of New York Law	17
	Respondent Ignores the Agreement of the Parties	18
	Cited Cases No Aid to Construction	20

PAGE

Petitioners' Offer of Proof Does Not Support Respondent's Contention 21

Waiver of "Right to Strike; Construction 21

A Contractual Defense Is Not Barred by the Commission of Unfair Labor Practices 22

Respondent's Misapplications of Section 13 23

The Detailed Findings of the Board Control Its Conclusion 24

CONCLUSION 25

Appendix "A".—Evolution and Variant Expressions of the "Loss of Status" Clause 26

Table of Cases.

	PAGE
Benedict v. *Limited Editions Club, Inc.*, 39 N. Y. Supp. (2nd) 852, 853 (Supreme Court, Appellate Division)	18
Garner v. *I. B. T.*, 346 U. S. 483	7
Inland Steel Case, 170 F. (2nd) 247, cert. den. 336 U. S. 960	9
Labor Board Cases, 301 U. S. 1	6
Local No. 3, United Packinghouse Workers v. *N. L. R. B.*, 210 F. (2nd) 235, cert. den. 348 U. S. 822	9, 23
Matter of Western Union Telegraph Co., 299 N. Y. 177	17
NLRB v. *Sands Mfg. Co.*, 306 U. S. 332	15
National Electric Products, 80 NLRB 995	19
Thompson Products case, 72 NLRB 150	1

Statutes.

National Labor Relations Act,	
Section 8(d)(4)	1, 4, 5, 8, 9, 11, 12, 15, 26
Section 10(c)	1, 5, 12
Section 10(j)	1
Section 9(e)(3)	11
Section 13	15, 18, 23, 24
Section 10(a)	18

PAGE

Labor Management Relations Act,
Section 206-210 15
Section 305 15

New York Arbitration Law, Civil Practice Act,
Section 1448 18

MISCELLANEOUS.

S. Rept. No. 105 on S. 1126, p. 28, 1 Leg. Hist. 443 ..... 5, 10, 15, 26

H. Conf. Rept. No. 510 on HR 3020, pp. 38, 39, 1 Leg. Hist. 542, 543 ..... 1, 10, 27

H. R. 3020 6

H. Conf. Rept., pp. 38-39, 1 Leg. Hist. 542-543 12

2 Leg. Hist. 1523 4

1 Leg. Hist. 116 5

1 Leg. Hist. 244 6

1 Leg. Hist. 513 6

1 Leg. Hist. 553 10

2 Leg. Hist. 1007 10

2 Leg. Hist. 956-957 11

1 Leg. Hist. 562, 563 11

I Leg. Hist. 537 11

1 Leg. Hist. 318, 319 H. R. Comm. 12

1 Leg. Hist. 542, 543 H. Conf. Com., 2 Leg. Hist. 1538, 1549, S. Conf. 12

53 Col. L. Rev. 1023, 1025 7

"Labor-Management Contract Provisions, 1950-51" Bull. No. 1091, pp. 28-29 ..... 14, 17, 19

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PETITIONERS' REPLY BRIEF.

I.

The "Loss of Status" Question.

Counsel will adopt the method of criticizing the brief on this question *seriatim*.

Misstatements of Petitioners' Contentions Corrected.

1. Petitioners' contention is not accurately stated (R. B. 44). The fourth duty paragraph of Section 8(d), sometimes cited as Section 8(d)(4), prohibits a strike by the incumbent bargaining agent only; it has no relation to the conduct of any other union group. Its sanctions are prohibitory and mandatory orders under Sections 10(c) and 10(j) and a denial of reinstatement to employees participating in a violation.[1] In contradistinction the "loss of

[1] H. Conf. Rept. No. 510 on HR 3020, pp. 38, 39, 1 Leg. Hist. 542, 543. Petrs. Brief, 54-55. Citing, *inter alia*, the second *Thompson Products* case, 72 NLRB 150.

status" clause does not prohibit any strike whatever. It does not declare that a strike is unlawful or improper. It merely bars one who strikes during the renegotiation period from the remedial processes of the Board dealing with the redress of unfair labor practices and the resolution of representation questions. The "loss of status" clause deals with a separate facet of the renegotiation problem; it deals with "interfering strikes" rather than with "unlawful strikes"; it is complementary to the obligation to maintain without strike the existing working conditions, not repetitive of that obligation.

Congress recognized that the duty to maintain conditions without strike bound not only the contracting labor organization but also the employees as individuals to the extent that the incumbent is bound, for in the sentence dealing with superseding organizations it refers to "The duties imposed upon . . . employees . . . by paragraph(s) . . . 4". As demonstrated in the main brief (RB. 27) Congress repeatedly asserted that no further sanction for violations of this type—unfair labor practices—was necessary. The loss of status clause was necessary to reach conduct which did not amount to an unfair labor practice but which would be equally, if not more, disruptive of peaceful negotiation.

Moreover, there is another inaccuracy in the statement of contention. While it may be true that petitioners became "free to discharge the strikers" (RB. 44-45) it is no part of petitioners' contention under the "loss of status" clause that a discharge was needful to effect the loss of status. (The discharge in this case occurred 30 days after the commencement of the strike.) The loss is automatic, independent of any act of the employer and is available to any party in a representation proceeding or in an unfair labor practice proceeding.

The Board's Findings Are Ambiguous and Self-Contradictory.

2. Respondent's counsel (RB. 45) is insistent on the Board's finding that the strike was "caused and prolonged solely" by the unfair labor practices. Actually the Board's own findings are self-contradictory in this aspect, and ambiguous as to one facet of the situation. It is affirmatively found that the strikers on the day following the calling of the strike demanded the reinstatement of Ciccone as a condition—and the only condition—requisite to a termination of the strike (R. 304). It is clear from the testimony supporting this finding (R. 46) that reinstatement *without prior arbitration* is meant. There was a demand in the pending negotiations that the discharge power be shifted out of the employer and into an arbitrator (Demand 2, Ex. 3, R. 265 in evid., R. 74, relating to change of arbitration clause R. 259 and discharge clause R. 261). Insofar as the strike was prolonged by insistence on a procedure at variance with the existing contract—a procedure then in the negotiation stage only—it cannot be said to have been prolonged "solely" by the unfair labor practices.* That is the contradictory finding.

The ambiguity exists in connection with the "sole causation" finding. The Board finds a series of unfair labor practices which of themselves did not produce a strike plus the unfair labor practice involved in the discharge of Ciccone which, added to the rest, caused the strike. But did the discharge element in the motivation occur because the strikers did not wish—as their ante-strike and post-strike demands indicated—the employer to have the power to dis-

* Had the claim gone to arbitration Ciccone would have been reinstated. He had not in fact violated Maccaferri's order as Maccaferri construed it (R. 316). No question of unfair labor practice would arise under the issue of "proper cause" for discharge (R. 261).

charge at all? It is one thing to say that the discharge of Ciccone was an unfair labor practice and the discharge of Ciccone precipitated the strike, therefore the strike was caused by an unfair labor practice. It is another thing to say that the strikers had demanded that only the arbitrator have the discharge power, that the discharge of Ciccone was an exercise of the discharge power by the employer, that they struck because the employer exercised the discharge power and offered to return if the discharge were rescinded. That is the ambiguous aspect of the finding. It may be said that the ambiguity was resolved according to the pre-Taft Hartley rule of the burden of proof in cases of mixed motivation. But is such a rule to be applied in a case where paramount public interest has dictated abstention from strike?*

It is believed that even the Board would concede that a strike designed to shift the discharge power out of the employer and into an arbitrator would involve a failure to "continue in full force and effect . . . all the terms and conditions of the existing contract. . . ." For the existing contract clearly vested the discharge power in the employer subject to arbitration (R. 261).

A strike is an indivisible event. A strike in renegotiation time is an interfering event. In construing a provision adopted not primarily for the protection of the employer nor primarily for the protection of the employee but primarily for the protection of the public is the Board to be permitted to divide the indivisible interference according to the motive or objective of the interferer? The form of the "loss of status" clause answers this question in the negative. Congress might have provided that the interferer should be denied reinstatement,

* Senator Ball in an extension of remarks (2 Leg. Hist. 1523) identified Section 8(d) as one of two provisions, "aimed primarily at protecting the public". The other was the "national emergency" provision.

allowing to the Board its fact finding leverage and its discretionary functions under Section 10. But it did not so enact; instead, it provided for a complete deprivation of Board jurisdiction over the interfering striker in respect of his claims of unfair labor practices and representation rights. Loss of status goes to the jurisdiction of the Board, and the enactment took that form precisely because Congress wished to prevent the Board from speculative determinations as to strike objectives and motivations in a matter of paramount public interest. Only the simpler determinations of the time of strike, the existence of the contract and the giving of notice were to be left to the Board.

It is hardly a rational construction of a statute which permits the Board to determine whether there has been an unfair labor practice in order to determine whether it had the power to make that determination in the first instance.

The "Loss of Status" Clause Deals With a Separate Facet of Renegotiation.

3. Respondent complains that petitioner "isolates" the "loss of status" clause (R. B. 49). While the statement is untrue in the aspect that petitioner does assert that the clause is organically related to the smooth working of the renegotiation scheme, the statement has this much truth to it; that petitioner does regard the loss of status clause as dealing with a distinct phase of the renegotiation problem. But this later form of "isolationism" is fully justified by the legislative history, for the clause was originally a *proviso* clause in form. S. 1126 as originally reported in the Senate has the substance of the clause as a second proviso at the end of Section 8(d). (1 Leg. Hist. 116). After setting out in a *proviso* clause the obligations of the party taking the lead in terminating or modifying the agreement it is

> "*Provided further*, That any employee who engages in a strike. . . ."

Such phraseology indicates recognition of the fact that the individual employee is a distinct phase of the renegotiation problem.

The bill passed the Senate, as H. R. 3020 without change as to this feature (1 Leg. Hist. 244). The *proviso* form was dropped in the Conference Report (1 Leg. Hist. 513).

The "Inequities" Claimed by Respondent Are Not Sustainable.

4. The catalogue of "incongruous consequences" (RB. 51-53) may be answered as follows:

(a) License to commit unfair labor practices.

An employer acquires no "license". The employee may strike at any time against an unfair labor practice; he has a complete election to adopt what he deems to be the effective remedy.

(b) The "satisfied and dissatisfied union" comparison.

The "rational justification" for differentiating in the treatment of a union in renegotiation lies in the fact that it has added the stress of renegotiation to its relationship with the employer, with its own members and with other unions. While the relationships are under stress, it is completely justifiable to confine the union to the ways of peace, if it desires to pursue them or to exclude the union from the ways of peace if it has chosen war.

(c) The "first contract—renewal contract" comparison.

This point might be simply and completely met by observing that the complaint really is that Congress has failed to legislate completely respecting the full range of evils within the scope of the subject matter.* But to stop with that observation might be to ignore what was, no doubt, a powerful con-

* *Cf.* Labor Board Cases, 301 U. S. 1.

sideration in the Congressional mind in imposing obligations on the parties and employees covered by a contract, namely that they were operating under conditions once mutually agreed upon as satisfactory and with the mutual guarantees of security in their relationships normal in collective contracts. Such contracts include, in most cases, a form of security —job tenure—which destroys in large part the efficacy of unfair labor practices. Under such conditions the imposition of the statutory obligations constituted a relatively light additional burden; but to parties without a contract, such burdens would be more grievous.

Procedural Delay Is No Criterion of Jurisdiction.

5. An argument based on the Board's delays is presented (R. B. 53-54) under the citation of 53 Col. L. Rev. 1023, 1025. A similar argument, rather more soundly based on the equity doctrine of remedial adequacy, received scant support from the Court in *Garner* v. *I. B. T.*, 346 U. S. 483. It is to be noted that "loss of status" goes to the jurisdiction of the Board, as did the question resolved in *Garner*.

The Legislative History Supports Petitioners' Construction.

6. The legislative history argument (R. B. 54-57) calls for a utilization of that material in a novel way. The legislative history is not used to resolve an ambiguity in the statutory language, nor even to show that patently clear language is latently ambiguous. Rather it seems to be called into play in a way reminiscent of the rule said to have been used in the interpretation of the Justinian Code about a century after its promulgation viz. that if there were no gloss on a provision, the provision was presumed to be inoperative. The argument appears to be that since there is nothing in the glosses to show that "any employee" meant "any employee", nor that a temporal standard was

intended, Congress could not have meant what it said. It is respectfully submitted that such a rule is untenable; the best evidence of what Congress intended was what Congress said.

The "loss of status" clause appeared three times in bill form in the course of its passage. It was also a subject of mention in two committee reports. These five expressions of the clause and its effect are set out in Appendix "A" hereto for ready comparison. Both the bill forms and the report forms adhere tenaciously to the universality, to the temporal standard and to the selective exclusion from the remedial advantages of the Act with the presuppositions implied by such exclusion. The less formal expressions in the committee reports dilute in no way the clarity of the statute itself. Congressional debate discloses no dilution; the minority attack on the provision was founded on a literal construction which the sponsors did not question.

There is a significant change emphasizing the concept of temporality between the Senate versions and the final enactment. In the former the phrase "prior to the expiration of (the period)" was used; it was replaced by the phrase "within (the period)." Apparently it was recognized that the former expression could be construed to apply to a time prior to the service of notice of modification, a period when the stressing forces of renegotiation had not been applied to the relationship; for the correction made the clause operative only co-terminously with the renegotiation period. The Committee clearly recognized that time was the test.

So far as the legislative history actually cited by Respondent goes (RB. 54, 55, 56), it supports a proposition of law that is not at all in issue viz. "that (the proviso of) Section 8 (d) is devoted entirely to the orderly functioning of the bargaining process" (RB. 50) but goes no

further. It does not bear at all on the question of whether Congress conceived that one type of strike was more disruptive or less disruptive of peaceful renegotiation than any other type. Respondent does not essay anything more on this issue than the *non-sequitur*, already observed, resting on the premise that only negotiation strikes interfere with negotiation. There is nothing offered to show how an employer can peaceably negotiate on, for example, pensions while his plant is struck for recognition or for claimed unfair labor practices, or for the splitting of a unit.

Suppose the incumbent union's renewal demands include a request for modification of a unilateral pension plan and the employer offers to bargain on all other items but takes the position which the employer took in the *Inland Steel* Case, 170 F. (2nd) 247, cert. den. 336 U. S. 960, viz. that it is not required to bargain on the pension item. Why does not a strike called to secure a commitment to adjust the pension plan disrupt the negotiation as much as a strike called to secure a commitment to advance rates of pay? Is the strike against the unfair labor practice of refusal to bargain less disruptive? On such questions—the real issue—Respondent is silent.

The quoted floor speech of Senator Ball (R. 56) referring to "quickie strikes" was rejected as a limiting factor in the construction of Section 8(d) by the Eighth Circuit in *Local No. 3, United Packinghouse Workers* v. *N. L. R. B.*, 210 F. (2nd) 235, cert. den. 348 U. S. 822. But nothing is shown as to the applicability of the "quickie strike" notion to the specific problem in the case at bar. Does the fact that a strike is a "quickie" negative in some way the involvement—real or contended—of unfair labor practice questions or representation questions? No technical significance appears to attach to the word "quickie".

Harking back to the action of the 74th Congress in enacting the Wagner Act of 1935 (Footnote 29, RB. 58)

Respondent cites the Senate Committee Report reasoning that to hold that an unfair labor practice striker was no longer an employee would be to give "legal sanction to an illegal act." Evidently the 80th Congress reached a conclusion not so sweeping, for its Conference Committee desired some change in the preferred treatment given "unfair labor practice" strikers (H. Conf. Rep't 510 on H. R. 3020, page 49; 1 Leg. Hist. 553; Petrs'. Brief, App., p. 59). The "loss of status" clause expressly withdraws redress for unfair labor practices.

If the general outlook of Congress on the question of which types of strike should be curtailed, is of any importance in resolving this issue (which this counsel doubts), the following attitude of the Senate Committee stated by Senator Taft in introducing S. 1126 is entitled to some weight (2 Leg. Hist. 1007):

> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions."

Continuing:

> "We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

The colloquy between Senators Ball and Morse (RB. 58) is described in completely misleading fashion. Morse objected to the definition of employee in the Ball bill on two grounds, first, that it permitted an employer simply by hiring strike-breakers to determine the status of strikers; second, that it abolished the distinction between unfair labor practice strikers and others. Ball agreed that his bill went too far without indicating in which aspect it went

too far (2 Leg. Hist. 956-957). No conclusion bearing on the question at bar can be drawn from the colloquy.

The proposal to prohibit strikes to remedy "practices for which an administrative remedy is available" was lumped in the House Bill with eight other prohibitions in a Section (numbered "12") which in three other subdivisions contained six additional prohibitions. Of these fourteen proposals the Conference Committee said, without specification (except in the case of monopolistic strikes), that some were covered by various sections of the Conference Agreement in different form or by existing law (1 Leg. Hist. 562, 563). And that is all the Committee said in that regard. To what extent the "strike to remedy practices for which an administrative remedy is available" appears in Section 8(d) is a question which this bit of legislative history does nothing to resolve. Much more pointed legislative history lies in the hope expressed by the Committee that the *National Silver* case would be overruled (1 Leg. Hist. 537, Petrs'. Brief 52, 53). In any event the rejection of a general measure outlawing strikes for the stated purpose is insignificant on the question whether during a limited time of special stress the normal remedies of such strikers should be withdrawn.

The *Union Mfg. Co.* case (RB. 55) cited for the proposition that unfair labor practice strikers enjoy exemption under the voting procedures of Section 9(c)(3) does not deal with that issue. The stipulation of facts under which the case was tried was to the effect that the strike involved was an economic strike. But even assuming that the proposition of law is true, it has no bearing on the issue at bar for there is no inconsistency in recognizing the superior standing of an unfair labor practice striker in the generality of cases and compelling the victim of an unfair labor practice to elect his remedy by strike or by adjudication when his strike will be an interference with renegotiation.

Respondent's speculations (RB. 60-61) concerning the reason why Congress inserted in the loss of status clause a specification of loss of jurisdiction under Sections 8, 9 and 10 are, in the first place, unsubstantiated by the legislative history. While it is true that Congress was concerned that the *Berkshire Knitting Mills* "minor crimes" doctrine of the Board should stand abrogated, discussions of that subject in the Committee reports do not reveal that Section 8(d) was in any wise involved (1 Leg. Hist. 318, 319, H. R. Comm.; 1 Leg. Hist. 542, 543, H. Conf. Com., 2 Leg. Hist. 1538, 1539, S. Conf.). In the second place, the "loss of status" clause has no direct relation to reinstatement; it operates on the jurisdiction of the Board to entertain an unfair labor practice or a representation proceeding in the case of a terminal period striker.

Most importantly, however, Congress believed (H. Conf. Rept., pp. 38-39, 1 Leg. Hist. 542-543, Petr. Brief, 54-56) that it had met the problem which counsel envisions, viz. that the Board would regard participation in a terminal period strike as a "minor crime" insufficient to bar reinstatement, by the enactment of the "discharge for cause" provision of Section 10(c). It thus was aware that the striker who participated in an economic strike called out of time by the incumbent union—a violation of Section 8(d)(4)—could not be the subject of a reinstatement or back pay order *if discharged by his employer*. If the objective ascribed to Congress by Respondent were the only objective, then there was no need for a further "sanction". But that Congress went further in the much broader terms of the "loss of status" clause—terms broad enough to reach any "interfering strike"—is convincing evidence that it was not merely specifying a superfluous "sanction" but was trying to reach interfering conduct not covered by the remainder of the enactment. In the "loss of status"

clause Congress is dealing with strikes not in terms of whether they are right or wrong, justifiable or inexcusable, fair or unfair but in terms of whether they interfere with the orderly conduct of renegotiation.

An enactment which is jurisdictional, universal, selective and automatic is no inane repetition; it is designed to reach "interfering strikes" whether they be "memorial strikes", "ab' and willing strikes", "production standard strikes", "wildcat strikes", "sympathy strikes", "jurisdictional strikes", "featherbedding strikes", "recognition strikes", "unauthorized strikes" or otherwise. It recognizes only two types of strikes—those which interfere with smooth renegotiation and those which do not.

II.

The "Breach of Contract" Question.

Statistical Information Negatives Respondent's Construction.

1. A large portion of Respondent's brief on the breach of contract question appears to be devoted not to exploring the actual intent of the parties to the agreement but to theorizing, from generic legal principles as to what their intent could have been. It is respectfully submitted that such speculation, divorced from the realities of the bargaining table, is of little weight in construing an obligation universal and unambiguous in its terms.

A much more realistic appraisal of the intent of bargaining parties can be made by observing what parties faced with the problem of bargaining out "no strike" clauses have in fact done. If they have in actual practice and in significant numbers written limitations into "no strike" clauses, the inference is inescapable that an abso-

lute clause is absolute in their minds and requires limitation if limitation is intended.

Analyzing 2,578 collective contracts current *circa* 1951 the Bureau of Labor Statistics* found that 12% contained no work stoppage provisions, 32% contained unconditional bans on work stoppages and 56% contained conditional bans on work stoppages. In the manufacturing industries, of 1,742 contracts, 7% contained no work stoppage provisions, 33% an unconditional ban and 60% a conditional ban. In the cases wherein parties had given evidence of formal consideration of the "no-strike" clause, it is thus seen that roughly two-thirds of the negotiators involved appraised an absolute no-strike clause as so absolute in operation that it required limitation.

In its commentary, the Bureau observes (p. 28):

> "In over a third of the total agreements, work stoppages were permitted for certain specified causes such as: deadlock over the negotiation of changes in the general wage level during the term of the contract; enforcement of compliance with the agreement; refusal of either party to arbitrate or to abide by the decision of the arbitrator; *or a dispute over nonarbitrable issues.* (Emphasis supplied.)

The Bureau further observes (p. 28):

> "In most cases parallel restrictions were imposed on lockouts."

The statistical fact appears to be that when parties intend conditions or limitations on "no strike" undertakings they tend overwhelmingly to express them and not to leave them to implication. If the standard of interpreta-

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* "Labor-Management Contract Provisions, 1950-51" Bull. No. 1091, pp. 28-29.

tion of contractual language be that of the "reasonable man", here we have him—and with a scientifically more solid vertebra than usual in our profession.

Unfortunately the available contract statistics contain no correlation tables tending to show which *quid* is for which *quo*. If such existed, they might enable us to get at another error found *passim* in Respondent's treatment of the contract issue, viz., the error that the "other promises . . . measure the extent to which the parties intended to relinquish recourse to strike or lockout" (RB. 25).

That may well be the rule where the agreement contains no work-stoppage clause whatever, but where the parties have bargained out a no-strike undertaking, the best evidence of their intent is the language which they use to express it. And the best gauge of the language is not to be found on the woolsack but in the market place.

Correction of Reference to Section 13; Applicability.

2. Respondent's reference to Section 13 of the National Labor Relations Act (RB. 21, 22, Footnote 5) is apt to be confusing. With respect to the exceptions "specifically provided for herein" four exceptions are cited. However there are only two in "this Act" i. e. the National Labor Relations Act, viz., Section 8(b)(4) and Section 8(d). There are two other limitations in the "Labor Management Relations Act", viz., Section 206-210 and Section 305. These latter are not exceptions.

It is clear that the amendment of the Section insofar as it added the words "affect the limitations or qualifications on that right (to strike)" had reference to contractual limitations, *inter alia*. The Senate Committee Report (S. Rept. No. 105 on S. 1126, p. 28, 1 Leg. Hist. 434) cites *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 as an instance of a type of limitation recognized in the newly added phrase.

Even under Respondent's "Correlative" Construction Petitioner Prevails.

3. Respondent's argument repeats, in different words the Board error mentioned in Petitioners' Brief (40-42). It is reiterated that the agreement relates to "substantive employment terms" (RB. 26). It should be sufficient rebuttal to call attention to the elaborate "union status" terms of the contract which the Board ignored. The parties had contracted with reference to "union status", wherefore even under the restrictive "correlative" canon of construction employed by the Board, a strike originating in a matter involving "union status" is covered by the "no strike" clause.

Confusion of the Existence of Rights With Their Arbitrability.

4. Respondent's conclusion (p. 27) that "it is not fairly inferrable that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement" is based on the unfounded assumption that unless a controversy is arbitrable there is no remedy. An inarbitrable controversy may well be a justiciable controversy or a controversy determinable administratively.

It is not hard to imagine a controversy arising under the contract at bar which would present a question determinable only by the National Labor Relations Board. Suppose some change in the operative procedures of the company occurred which would draw in question the continued propriety of the unit e.g. the installation of a boiler room to provide steam to plasticize materials instead of the machine-unit heating system now employed. The Operating Engineers Union, to which petitioner might have to resort to obtain a licensed high pressure engineer, might claim the employees in the boiler room who, nevertheless would be performing "production" work. The resulting controversy would be determinable only by NLRB; no contract arbitra-

tor could resolve it. Indubitably, however, a strike on such an issue would violate the no-strike clause.

The arbitrability of controversies under a contract cannot be the measure of a no-strike undertaking. To accept it as such leads to the absurdity that no contract is valid without an arbitration clause.*

The opinion in the *Wagner Iron Works* case, quoted at length (RB. 28) rests upon the special language of the contract therein construed and is inapposite here, where there is no language elsewhere in the contract limiting the absolute character of the "no-strike" undertaking.

Reexamination of New York Law.

5. Respondent's attempt to circumvent *Matter of Western Union Telegraph Co.*, 299 N. Y. 177 as controlling authority on the New York Law (RB. 29, Footnote 11) ignores an inescapable inference of the decision. The clause which the arbitrator was held to have modified was the "no-strike" clause itself, which was absolute on its face. There was no "substantive term of employment" relating to "struck traffic" in the contract, and by Respondent's theory, this would have permitted the arbitrator to construe the absolute undertaking of the "no-strike" clause as inapplicable to a refusal to handle "struck traffic". The Court of Appeals necessarily decided that a no-strike clause absolute in form was not limited by the substantive undertakings in the contract but was to be construed by its terms standing alone.

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* Of a sample of 302 contracts examined, effective *circa* 1951, the Bureau of Labor Statistics found that slightly more than 10% had no arbitration provisions. A 1949 study of 1,560 contracts disclosed about 20% without arbitration provisions. Labor-Management Contract Provisions, Bull. No. 1091, B. 25, p. 9.

In the same footnote Respondent refers to *Benedict* v. *Limited Editions Club, Inc.*,* 39 N. Y. Supp. (2nd) 852, 853 (Supreme Court, Appellate Division). As shown above, arbitrability of the controversy is not the criterion for the construction of the "no-strike" clause; the remedies may lie with judicial or administrative bodies. Moreover, the same act may give rise to arbitral rights as well as to administrative remedies, for example, as the Second Circuit conceded, the Ciccone discharge was arbitrable on the issue of "proper cause". It would, no doubt, have been decided in Ciccone's favor (since he did not in fact violate orders his discharge was founded on a mistake of fact (R. 316)) without any reference to the character of the discharge as an unfair labor practice.

The inference which Respondent now seeks to draw from the *Benedict* case is not permissible under Section 13 of the Act. That section might well be paraphrased "Do not construe any limitation or qualification of the right to strike which you find in any contract or in any state law or in any other federal law in the framework of an unfair labor practice". Concretely, a "no strike" clause operates alike on conduct which is an unfair labor practice and on conduct which is not an unfair labor practice. The fact that an arbitrator cannot be vested with jurisdiction to prevent an unfair labor practice does not limit the scope of a no strike clause.

Respondent Ignores the Agreement of the Parties.

6. Respondent's argumentation (RB. 29-35) suggests strongly that it is trying to erect a rule of law under the

* Although the New York Arbitration Law, Civil Practice Act Sec. 1448, has been amended to permit the arbitration of non-justiciable controversies and the NLRA Sec. 10(a) has been amended to omit the word "exclusive", the same result would probably be reached today under the *Garner* doctrine.

mask of a canon of construction in a matter which Congress has designedly reserved for agreement of the parties. Are we henceforth to draft "no strike" clauses in a form resembling a litany of the saints starting with an undertaking to refrain from (or to commit*) unfair labor practices, *co nomine?* No generic form would appear to satisfy the Board. The *Ford Motor* case (RB. 30-31) deals with a no strike clause which, the opinion states, had no effect on the result. The Bureau of Labor Statistics (RB. 32) departs from its function of counting to draw an unmathematical conclusion apparently at variance with its later statistical conclusion that 32 per cent of collective contracts contain unconditional "no-strike" clauses and that of 56 per cent containing conditional no strike clauses only about 40 per cent permitted work stoppages after exhaustion of the grievance procedure.** That would leave 48 per cent of the contracts either unconditional or not conditioned upon the grievance procedure.

The conclusion drawn (RB. 32) from the foregoing "that a pledge not to strike is not a promise dissociated from the remainder of the agreement but has its reason for being in the substantive terms settled by the agreement and in the contractual adjustment process that the agreement creates as a substitute for self-help with respect to contract differences" could as well be said with reference to the implied pledges of contracts which say not a word about abstention from strike. Have the 93 per cent of our manufacturers*** who have labored to secure express commit-

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* The "no-strike" clause in *National Electric Products*, 80 NLRB 995, was honored by the Board because the management had undertaken to commit what was adjudged to be an unfair labor practice.

** Labor-Management Contract Provisions, 1950-51 Bull. No. 1091, Bureau of Labor Statistics, p. 28.

*** Op. Cit. p. 29.

ments to abstain from strike achieved nothing? And have their labor counterparts secured no greater protection against the lockout than if they had never bargained out a no-lockout clause?

Of course it is true that a no-strike clause is not a promise dissociated from the remainder of the contract. But that is not the question here. The question is what the parties agreed to.

The record here shows that the incumbent union demanded a Welfare Plan in 1948, again in 1949 and was reiterating its demand in 1950. A Welfare Plan was thus not one of the substantive terms of employment. It is not mentioned in the contract directly or by any reasonable implication, hence a controversy about such a plan could not be processed through the "contractual adjustment process that the agreement created as a substitute for 'self-help". It had never been in force and hence could not be what the Second Circuit, sensing the inadequacy of its reasoning, vaguely called "the normal day-to-day relations of the parties. Would a strike to put such a plan in force violate the no-strike pledge?

Or suppose the employer in this case instead of contenting himself with mere encouragement of the rival union, Local 318, had in fact locked out all the adherents of the incumbent union during the contract term. Would such a lockout violate the parallel no lockout clause?

The answers to these questions are to be sought not in abstract speculation about the office and function of no-strike clauses but in the words of the specific undertaking.

Cited Cases No Aid to Construction.

7. The cases cited (RB. 32) in support of the proposition that if the employer refuses to arbitrate the union may treat the contract as breached—if it contains an

arbitration clause—establish no more than that the arbitration clause, where it exists, is a substantial term of the contract. They fall short of establishing that, absent an arbitrable controversy, there is no remedy or that absent an arbitrable controversy an unlimited no strike clause is to be limited.

Petitioners' Offer of Proof Does Not Support Respondent's Contention.

8. While it is hardly a fair procedure to reject an offer of proof and then use the offer against a party Respondent's footnote (No. 15, p. 33) will be answered. Simply, the demand for "broad form" arbitration was made and rejected without any concomitant alteration or proposal to alter the no-strike undertaking. Certain changes in the no-strike arrangements were made in the 1949 contract unrelated to the issue. It could have been shown that the union had argued that since the existing (1948) no-strike clause was absolute there should be a concomitant extension of arbitration arrangements. Such bargaining demonstrates that each clause stood on its own feet so far as interpretation is concerned.

Waiver of Right to Strike; Construction.

9. The proposition that waivers of statutory rights must be clear and unmistakable (RB. 34) is fully met by the wording of the no strike clause before the Court. Whether the principle should be applied at all in a case where, in the public interest, consensual derogation of the right to strike is an active aim of the legislation is a question undetermined by this Court. It should be answered in the negative.

Respondent seeks (RB. 35) a showing that the employees have gained in exchange for the waiver a corresponding consideration. The discharge for "proper cause" provision

(R. 261) in the case at bar furnished a broader, quicker and more easily litigated protection with the burden of proof on the employer. Had the complainant union not rejected that contractual protection there would have been a strike of inconsequential duration and no issues pending five years later before this Court.

A Contractual Defense Is Not Barred by the Commission of Unfair Labor Practices.

10. The weakness in Respondent's argument (RB. 35-39) that petitioners should not be allowed to assert as a defense, a strike which was caused by their own unfair labor practices is twofold. First, a strike is not "caused" in the sense in which that term is used in contract law. Between the so-called "cause" and its claimed "effect" there is a wilful act on the part of the striker, a deliberate choice of alternatives. The employer's acts may furnish a "reason" or an "excuse" for a strike, but in no sense do they compel it. Nor in the facts of the case at bar was there any "hindrance" or obstruction to the employee in continuance at work; the Board expressly found to the contrary (R. 323, 340). The acts of the employees were their own acts; though they were posited in response to some act of the employer. There was not even any "clear and present danger" to them; their contract expiration was still twenty days off; the fair voting procedures of the Board could be relied upon to cancel out undue influences at the ballot box; there was no threat of withdrawal of recognition pending the determination of the representation proceeding; Ciccone could have and would have been reinstated quickly had they elected to follow existing contract procedure. The act of striking was their own voluntary act.

Second, as the Board found, the unfair labor practices were not a breach of the agreement (R. 323, 340).

To sustain the Board's position, this Court would have to hold that two wrongs make a right.

Respondent's Misapplications of Section 13.

11. In discussing Section 13, Respondent errs in asserting that the "limitations or qualifications" referred to relate to "limitations or qualifications" in the Act itself. The "limitations or qualifications" refer exclusively to "limitations or qualifications" *dehors* the Act i.e. limitations by contract, by state law or by other federal laws. The sense is that no part of the Wagner Act shall be used to cut down or to enlarge a limitation imposed by contract. The Board appears to have understood this for it disclaimed that it was treating the character of Petitioners' conduct as unfair labor practices as relevant. It said, instead that the "no strike" clause did not by its terms cover any conduct save that specified in the remainder of the agreement. The Board's error lay in failing to compare its findings of fact with the recognition, union security, checkoff and discharge clauses of the contract.

It is not so clear that the Second Circuit understood Section 13, for in rejecting the applicability of the Eighth Circuit's decision in *Local No. 3, UPW* v. *NLRB*, 210 F. (2nd) 235 cert. den. 348 U. S. 822, it said that "perhaps" the fact that there were unfair labor practices in the case at bar would distinguish the cases, indicating its failure to realize that Section 13 made the unfair labor practice issue irrelevant. Its argument to the effect that a waiver of "fundamental rights" protected by the statute would not be inferred in contractual language indicates a like failure.

While the statement of the Second Circuit that Section 13 "presupposes a limitation and has no significance as to whether there is one" is correct, its opinion leaves little doubt that the reason why it found there was no limitation

in this case was that the conduct of Petitioners constituted unfair labor practices.

Respondent also errs in stating that the effect of Section 13 is "entirely neutral" in this situation. Section 13 renders "entirely neutral" Section 8 and all other Sections of the Wagner Act on a question of contractual construction. While it recognizes and preserves the right to strike, it prevents the violation of Section 8 which may have "caused" the strike from becoming material in determining whether a limitation exists.

The Detailed Findings of the Board Control Its Conclusion.

12. Respondent misstates Petitioners' argument demonstrating that the Board's findings of fact relate to subject matters dealt with in the contract by coloring it with the phrase—no part of Petitioners' contention—to the effect that the acts of Petitioners "were therefore subject to the contractual adjustment procedures". Having erected thus a straw man, Respondent knocks him down. As previously demonstrated, the fact that a particular forum cannot be resorted to for a determination of rights, is no index as to the existence of the rights or of their vindicability in other forums.

Nor can the conclusive findings of the Board dispel its detailed findings of fact (RB. 42) which clearly show that the conduct complained of was conduct of a type dealt with in the contract. The Board cannot overrule the Board. It is not contended that all the acts found were arbitrable; it is sufficient for construction of the no-strike clause that the subject matters of the acts were matters of contractual cognizance.

Nor is it of any moment in the construction of the no-strike clause that (RB. 43) the acts, or some of them may have related to a period of time after the contract expira-

tion. A lockout during the contract term to procure a union commitment to a reduction of wages after the expiration of the contract would unquestionably have been a violation. What counts in contractual construction is whether the parties have comprehended the subject matter in their bargain, not whether a particular act is a violation.

Conclusion.

The matter should be remanded with instructions to expunge the reinstatement provisions.

Dated, New York, October 14, 1955.

Respectfully submitted,

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Appendix "A".

Evolution and Variant Expressions of the "Loss of Status" Clause.

1. S. 1126 as reported (1 Leg. Hist. 442)

"Provided further, That any employee who engages in a strike prior to the expiration of the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended,* but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

2. Accompanying Committee Report (S. Rept. No. 105 on S. 1126; 1 Leg. Hist. 430)

". . . Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed. . . .".

3. H. R. 3020 as passed Senate (1 Leg. Hist. 244)

"Provided further, That any employee who engages in a strike prior to the expiration of the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

4. Section 8 (d) N. L. R. A. (1 Leg. Hist. 513)

". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall

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* As corrected by an omnibus technical amendment substituting "this Act" for "The National Labor Relations Act," 2 Leg. Hist. 1017.

lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.'"

5. Accompanying Committee Report (H. Conf. Rept. No. 510 on H. R. 3020; 1 Leg. Hist. 539)

"An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act."